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SUPREME COURT, U. S.
Supreme Court U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 850

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LaRUSSO and JOSEPH CHAGNON,

Petitioners,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, THE BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX,

and

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals

for the Third Circuit, entered in the above entitled case on September 23, 1970.

Citations to Opinions Below

The District Court Opnion is reported in 302 F. Supp. 726 (1969) and is printed in Appendix C hereto.

The Opinion of the Court of Appeals for the Third Circuit is as yet unreported officially and is printed in Appendix A hereto.

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on September 23, 1970. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Can race be used as a basis for the employment and assignment of teachers, administrators, and other personnel by a Board of Education where there has been no finding of past or present racial discrimination requiring affirmative relief?

2. Can the predominant black race of students attending schools in the City of Newark serve as the predicate for the employment and assignment of black teachers and black administrators?

3. Can threats of civil disorder by a black community justify the defendants in ignoring the constitutional mandate of the equal protection clause of the United States Constitution?

4. In the absence of proven discrimination, is not discrimination against white employees "discrimination in reverse"?

5. What limits are imposed on a Court seeking to correct "defacto segregation" which exists without any discrimination?

The Constitutional Provision Involved

The Constitutional provision involved is the Equal Protection clause of the Fourteenth Amendment which provides in Section 1:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

This matter was heard on complaint before Judge Augelli in the United State District Court for the District of New Jersey without a jury. Jurisdiction was vested in the Court below by virtue of 28 U.S.C.A. §1343. The suit was filed by ten white teachers of the City of Newark, under the Civil Rights Act, 42 U.S.C. §1983, who alleged a violation of their civil rights in that they were deprived of the right to a promotional position in the City of Newark by reason of the fact that they were white.

The defendant The Board of Education of Newark, in the County of Essex frankly admitted that it used color as a consideration in the appointment of principals in response to a "community clamor" for black administrators.

The sole question considered by the court below was whether or not the Fourteenth Amendment to the Constitution of the United States permits this type of preference in the absence of any known past or present discrimination.

The District Court did not consider any of the evidence presented by the intervenors and specifically stated that it made no finding on the issue of alleged discrimination.

The plaintiffs herein, on or about February 1, 1967, entered into a labor contract with the defendants which ran until February 1, 1970 (Exhibit P-1 in evidence, p. 4 of the transcript.) (Appendix A, herein as a footnote in the Opinion)

The plaintiffs herein took the examinations required and successfully passed, and they were on the lists in existence in August, 1968, awaiting their appointments in accordance with the terms of the contract (Exhibits P-3 and P-4 in evidence).

On August 22nd, the defendant Board abolished its obligation under the contract to make appointments from the lists which was completely contrary to the agreement dated February 1, 1967 (Exhibit P-6 in evidence).

Thereafter, the defendants made appointments without following the numerical promotional lists, in violation of the contract, under the admitted statement of facts that one of the considerations for the appointments being the color of the applicants' skin.

The defendant Franklyn Titus admitted that he had to violate the terms of the contract in abolishing the

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NOTE: All references are to exhibits and testimony contained in the trial transcript taken in the United States District Court for New Jersey.

lists before he could get black people appointed. See p. 13 of Exhibit P-11, lines 14 through 25, and p. 14, lines 1 through 6, where he said:

> "Q. Well, where didn't it? A. Because it didn't represent the kinds of racial mix that I feel is most important in accomplishing an educational program in the City of Newark, that's all.
>
> "Q. Now, you said 'racial mix'. So that what you were looking for were black principals, isn't that correct? A. I certainly wanted black representation.
>
> "Q. And you couldn't put black principals in at the present time while this list was in existence, could you? A. Not until the Board suspended the list.
>
> "Q. Right. And once the Board suspended the list, then you could make the appointment, is that right? A. Then I was free to take action to recommend to the Board, acting vice-principals, acting principals, acting teachers."

The defendant Titus testified that his actions were in response to a community demand when he said in P-11, p. 17, lines 7 through 26, and p. 18, lines 1 through 20:

> "Q. Qualify it. A. The community never said 'Replace this principal with a black principal,' to the best of my knowledge. What the community is saying is 'We want qualified black administrators.' Do you follow me?
>
> "Q. Yes. No specific instance is what you're saying. A. Yes.
>
> "Q. But they were hollering 'Get rid of some white principals.' A. Not get rid of them. Introduce some black.

"Q. All right. How would you introduce black without getting rid of white? A. The only way you can do it Mr. Walsh, was the way the Board took, suspension of rules, suspension of the examination procedure and negotiation to the end that the whole promotional procedure would be changed. And this was accomplished through introduction with the NTA.

"Q. Now, again boiling it down, I don't want to be repetitious about it, Mr. Titus. I think you have been very fair in your answers to me, and I appreciate your forwardness on it.

"Basically what you're saying is that there was a need in the Newark system for the appointment of qualified black personnel in the administrative positions of the Newark school system, and this could not be accomplished because of the existing barrier of an examination list and a promotional requirement or examination procedure, that in order to accomplish that it became necessary to abolish or suspend rather the promotional list, abolish the examination and make appointments which in part were based upon the color of a person's skin? A. Yes. And I'd just add one more word.

"Q. What is it? A. Acting appointments."

The defendant Titus testified that Harold Ashby, President of the School Board, who is a Negro, called all the teacher organizations together and invited them to submit proposals for ways and means to get black personnel into the schools in response to the community demands. He was aided in this meeting by Dr. Garret, also a Negro. (See Exhibit P-11, pp. 22 through 25.)

Mr. Titus testified that he responded to the community clamor of "give us black (administrators), we don't care

how," by appointing black administrators. (See p. 29, lines 14 through 25, and p. 30, lines 1 through 18.) P. 11

The defendant Titus would not answer the question of how he could fill the positions with people with black skin without discriminating against people with white skin. (See p. 30 of Exhibit P-11, lines 16 through 25, and p. 31, lines 1 through 15.)

Defendants have stipulated that race was a consideration in making the appointments complained of. (See Agreed Statement of Facts No. 10.)

Simeon Moss, a Negro, actually compiled the list that was submitted on August 22, 1968, in violation of the contract agreement. At pp. 97 and 98 of his deposition given August 29, 1968, which was marked Exhibit P-12 in evidence at p. 25 of the transcript, he stated as follows:

> "Q. Do you think that any of these other people that selected them selected them for some of the same reasons that you have said that you selected them, that is, the color of their skin, among other things—I stand corrected always on that. A. I made the recommendation. I recommended the people, and as you see here the majority of these people were black people.
>
> "Q. You frankly admitted to me, haven't you, that is part of your consideration? A. Right.

Thereafter Simeon Moss stated that color was one of his prime considerations (Exhibit P-12, lines 10 through 13 of p. 98):

> "Q. But it was still one of the considerations, wasn't it? A. On my part it was one of the prime considerations."

23. Mr. Knopf, assistant to Mr. Moss, admitted that you could not get on the list for appointment on August 22, 1968, unless the color of your skin was considered (Exhibit P-12, p. 101, lines 4 through 24):

> "Q. In other words, to get on that list you considered whether or not a man was black? A. Having heard Mr. Moss' statement about this, I would concur one hundred percent in what he said.
>
> "Q. And your idea was to get as many black administrators into the Newark school system at this time—as many qualified black administrators into the Newark school system as you could at this time? A. Hopefully, yes."

Mrs. Gladys Churchman, a member of the defendant The Board of Education of Newark, also a Negro testified that she and other members of the Board were looking for ways to appoint black people and that in order to get rid of the people on the white list and to circumvent the Board's contract, it was necessary to abolish the list (Exhibit P-11, p. 32, lines 14 through 23, and p. 22, lines 13 through 22):

> "Q. Just hold it there for a moment. Now, you discussed suspending the rule. You and other members of the Board were looking for ways, were you not, to appoint black personnel in these positions to meet this need? A. Yes.
>
> "Q. Is that correct? A. Yes.
>
> "Q. And you assume you were told you couldn't do it because there was in existence a contract and a Board rule which said that you had to make appointments from a promotion list, isn't that correct? A. That's true.

* * *

"Q. Now, part of your reason then for getting rid of the list, promotional list, and the examination procedure then was to provide an opportunity or a viaduct by which you could have black appointees to these positions, was it not? A. Black qualified.

"Q. Black qualified, always that, black qualified, isn't that right? A. That's true.

"Q. And you couldn't do it while that list was in existence, could you? A. That's true."

Mr. Cervase, a member of the Board, admitted that one of the elements necessary to be considered for the job was that you would be black, when at pp. 53 and 54 of the depositions taken September 9th (Exhibit P-11 in evidence), he stated as follows:

"Q. So now you boiled it down to two qualifications. One is they were qualified, and the other was they were black. So that in order to get the job you had to be black and qualified; isn't that correct? A. That's correct.

"Q. Ergo, to be white and qualified you couldn't get the job, could you? A. Well, that would be the implication.

"Mr. Walsh: That's all."

Mr. Ashby's entire testimony reveals that he had no familiarity with the abilities of those who were appointed or failed of appointment. (See colloquy of Court pp. 497-499, and specifically p. 504 of the trial transcript.)

Mr. Ashby positively established the fact that Woodrow F. Davis, a Negro, was in No. 46 position on the vice-principals' list (Exhibit P-4) and was jumped over nine other white candidates, who preceded him in the numerical list, to the appointment of acting principal at Hawthorne

Avenue School, and he could not explain his vote permitting the appointment of Mr. Davis over other qualified white applicants (p. 517 of the trial transcript).

There was no evidence whatsoever established in this case as to discrimination against Negroes in applying for positions or taking the examinations in the Newark Board of Education. The testimony of all the witnesses and each item of evidence introduced by the intervenor establishes the fact that no discrimination existed.

The District Court in its opinion, found that no criteria for appointment to promotoinal positions, as of the time of the writing of the opinion, had been established. The court went on to state that it was the court's understanding that a criteria for selecting from the promotional list would be established and that there was no reason to believe that when such criteria was established there would be established a procedure that could infringe upon the right of white teachers to be free from discrimination because of race.

The court completely overlooked the straight-forward admission by counsel for the defendant that the procedure approved by the court below would still have to consider the color of one's skin.

The defendant, through its counsel, has admitted that the present pooling jury box type of selection would be unconstitutional unless the court below put its imprimatur on the use of color as a basis for selection, as it indeed did.

At pp. 593 and 594 of the trial transcript counsel for the defendant admitted as follows:

> "I might say this to you. I, for one, if this were the present situation, would say that this would

be unconstitutional. I think we would be in derogation of our duty, having the situation we have, because what would happen is that in growing into this pattern coming up we would be in the same spot we are in now and still not know where we are going. We would have to know the individuals we are dealing with. And one of the factors in knowing would, in fact, have to be the color of their skin.

"The Court: In other words, you are saying that even if the pool were used, rather than a random drawing which was not disclosed beforehand, black or white, you are saying that the Superintendent, or whoever does make the selection, would have to know the color of the applicant, is that what you are saying?

* * *

"The Court: And if you took a jury wheel, or a pool, as we have been calling it here, and in dipping his hand in it the Superintendent pulls out all white applicants, you would say that would be no good.

"Mr. DeFilippo: I didn't say it would be no good. I say it would be in derogation of our duty, if he had the problem that he has in this city and one of those problems was to have an integrated faculty.

"This would be no different, I may submit to your Honor—If I may, again, without being presumptuous—if in the south they did the same thing, and they said, 'We did this fair and square. We dip in and we come up with white people.' Let's assume that it was as fair as it possibly could be. This would be unconstitutional.

"The Court: What you are saying, really, is that in selecting the help for these administrative posi-

tions the school superintendent must know whether the person involved, or the applicant, is black or white.

"Mr. DeFilippo: Under this situation, sir, the answer is yes.

"The Court: Yes, under the existing situation, where we have some schools with a predominantly black student body. That is what you are saying.

"Mr. DeFilippo: That is correct.

"The Court: All right.

"Mr. DeFilippo: That's all I have."

Reasons for Granting the Writ

The decision rendered below is in direct conflict with the holdings of the Sixth, Eighth, Fourth, Fifth, First, Tenth, and Second Circuits.

(a) The rule of law cited as a conflict in the Sixth Circuit is set forth in *Rolfe* v. *County Board of Education,* 391 F. 2d 77, 79 and 80:

> "At this date it is beyond contention that the Fourteenth Amendment to the United States Constitution forbids the selection and assignment of teachers on the basis of race.
>
> • • •
>
> "The rule is that teachers displaced from a school with a racially homogeneous faculty, because of a decrease in students, must be judged for continued employment by definite objective standards with all other teachers in the system."

(b) The rule of law cited as a conflict in the Eighth Circuit is set forth in *Kelley* v. *Altheimer, et al.,* 378 F. 2d 483, 493:

> "The Fourth, Fifth and Tenth Circuits have also held that race must be eliminated as a basis for the employment and assignment of teachers, administrators and other personnel."

If the defendants were to be permitted to proceed in the manner they describe, they would be creating a completely segregated school system in reverse of that which has been condemned in our southern states. The so-called all black schools (at least 77% non-white) would be governed by black principals who were selected because of the color of their skin, which, in reality, is a situation wherein the predominant race of the students serves as the predicate for the assignment of a principal. This is discrimination in reverse, and the courts have held that it cannot be done in this manner. To this effect see *Kemp* v. *Beasley,* 389 F. 2d 178, 189, and 190 (8th Cir. 1968):

> "However, refusal to transfer or assign white staff to minority schools or Negro staff to majority classrooms cannot be justified on the argument that educational standards would thereby be lowered. Any teacher qualified to teach white children ought to be competent to teach Negroes and vice-versa. We are concerned with standards of equal education for all students—whether they be white or Negro. The argument for providing superior education for either race alone does not attract or persuade us.
>
> " 'Racial balance' can perhaps be measured more adequately by what it is not than by definition of what it is. It is not (1) a segregated Negro high school with an all Negro faculty, (2) nor is it an all Negro junior high school and four elementary schools with an all Negro faculty, (3) nor is it an

all white faculty in predominantly all white schools, (4) nor is it the assignment of one Negro teacher to school staffs composed of a dozen to twenty white teachers, (5) nor 2.4% of the school system's white faculty assigned to three of the seven minority schools.

"What then may be said to be that measure of racial balance necessary to meet constitutional standards? It is misleading to think that 'balance' means exact symmetry or equilibrium of the races. Numerical quotas or percentages, although appealing for their simplicity, lack that equitable flexibility which is still needed for a selective distribution of qualified teachers for particular faculty roles. But it misses the constitutional mark to say that this principle of flexibility then justifies a segregated faculty pattern. Both extremes overlook the derivation of the rights involved. We are dealing with the equal protection clause as it affects the overall educational process. The question thus becomes, when is there such faculty distribution as to provide equal opportunities to all students and to all teachers—whether white or Negro? Students in each school should have the same quality of instruction as in any other school. Every predominantly Negro school should have wherever possible, substantially as integrated a faculty as the predominantly white school. Involved is the basis principle that instruction for both white and Negro should include the opportunity for equal educational experiences. Obviously, the democratic ideal of equality of opportunity cannot be nurtured in a segregated environment.

> "The court's role in striking a racial balance of faculty is not the perplexing judicial task normally faced in the resolution of conflicting claims. Here there no longer exist conflicting interests between the parties. Their goal must be the same: a wholly desegregated school system. *When the predominant race of the students attending a particular school continues to serve as the predicate for the Board assignment of a teacher,* then equal opportunity is denied. *If a predominantly Negro faculty continues to create a pervasive influence on the students' choice of school,* then equal opportunity is denied. It is the simple recognition that all students and teachers must be treated alike. This guaranty has always been aimed at undue favor or class privilege. *Thus, the real determinant of racial balance becomes only the measurable application of equal protection of the law.* Appraisal of conformity to this principle is not new and should not be difficult within the judicial process." (italics added)

If the actions of the defendants in this case were to receive official sanction, the court in effect would be placing its imprimatur upon a dual type of school system, one white, one black, with all of its hideous implications of racial segregation, in that (1) we would have all black schools, or at least 77% non-white schools, manned by a principal named to that post because he was not white but because he was black, and (2) we would have white pupil schools manned by a principal named because he was not black but because he was white. This argument has been met by many courts and roundly defeated everytime it was urged.

The final case in the Eighth Circuit that completes the conflict is *Smith* v. *Board of Education,* 365 F. 2d 770

at 782. The court went on in the *Smith* case to point out that all of the environmental considerations or ability to communicate or speech pattern or capacity to establish rapport with the pupils, when these descriptions amount only to a euphemistic reference to an actual or assumed racial distinction, were wrong and amounted to a denial of due process, and the court concluded that the desegregation system meant that inevitably pupils would be taught by teachers opposite to their race, and that any manner of selection, other than ability described along some line of selectivity without regard to racial difference, was an avoidance of the obligation of the Boards to employ teachers in accord with constitutional standards. At page 782 it was stated:

> *"However, in this day race per se is an impermissible criterion for judging either an applicant's qualifications or the district's needs. And this applies equally to considerations described as environment or ability to communicate or speech patterns or capacity to establish rapport with pupils when when these descriptions amount only to euphemistic references to actual or assumed racial distions."*

(c) The rule of law cited as a conflict in the Fourth Circuit is *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275, 277 (1967). There the Circuit held:

> "The premise of such a proposition is that Mrs. Wall was not employed as a teacher in the Stanly County school system but was employed *as a Negro teacher in a Negro school.* Such a premise is unlawful. It is repugnant to the Fourteenth Amendment, which 'fordibs discrimination on account of race by a public school system with respect to employment of teachers.'"

(d) In addition to the above Circuits, the following Circuits are in direct conflict with the judgment sought to be reviewed:

1. Fifth Circuit, *Board* v. *Braxton,* 326 F. 2d 616 (Feb. 1964).

2. First Circuit, *Springfield* v. *Banksdale,* 348 F. 2d 261 (July, 1965).

3. Tenth Circuit, *Downs* v. *Board of Education,* 336 F. 2d 988.

4. Second Circuit, *Offerman* v. *Nitkowski,* 378 F. 2d 22 (May, 1967).

(e) The appointment of black personnel to meet the "community clamor" is in violation of the holding of this court in *Cooper* v. *Aaron,* 358 U.S. 1 (1958), which held that constitutional rights are not to be sacrificed to violence and disorder.

If the finding of the courts below are approved by this Court, it would be a go-ahead signal and a legal directive from this Court to every white community in the south and to every white community in the State of New Jersey to the effect that when they find that the predominant color of their community desires to have the color of one's skin used as a basis for the selection of the administrative officials in the school systems, they can do it with propriety.

There would be nothing in the law that would stop a white community from refusing the equal protection of the law to all qualified black applicants for positions. On the other hand, there would be nothing in the law, as in this case, that could or would protect qualified white applicants from being refused positions, because of their color, in a black community.

The Supreme Court and every Circuit Court in which the question has been raised have held that racial imbalance not caused by discrimination need not be corrected constitutionally or legally, but if it is to be considered at all, it must be confined within the constitutional mandate of the due process and equal protection clause of the constitution.

It is respectfully urged that the Writ issue.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 18,286-90

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LA RUSSO and JOSEPH CHAGNON

v.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, and THE BOARD OF EDUCATION OF NEWARK, IN THE CITY OF ESSEX

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES, *Intervenors* (in D.C.)

VICTOR PORCELLI, *Appellant in No. 18,286*
ARTHUR SHAPIRO, *Appellant in No. 18,287*
ALLAN M. COHN, *Appellant in No. 18,288*
MAXINE F. EDELSTEIN, *Appellant in No. 18,289*
HELEN R. JUSTIN, *Appellant in No. 18,290*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued April 24, 1970

Before GANEY, VAN DUSEN and GIBBONS, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 23, 1970)

PER CURIAM:

The plaintiffs herein, Victor Porcelli et al., ten white teachers employed by the Newark Board of Education, brought suit under the Civil Rights Act[1] alleging that as of May 28, 1968, the defendant, Superintendent of Schools in the City of Newark Franklyn Titus, acting under color of law for the Newark School System, subjected the plaintiffs to deprivation of their rights, privileges or immunities secured to them by the Constitution of the United States of America. This allegedly was accomplished by the abolition of a promotional list which had been in existence since 1953, which provided for oral and written examinations for anyone wishing to aspire to be principals or vice-principals in the System and which, it was contended by so doing, racially discriminated against whites whose names appeared on the promotional list for appointment. At the time of the abolition or suspension of the said promotional list, the first fifteen thereon had been appointed, but Porcelli, Bigley and Shapiro, plaintiffs herein, though eligible, had not yet been appointed.

The school population in the City of Newark in October, 1961, was 67,134, of which the Negro population was 55.1%. In September, 1968, the total school population was 75,876, with a Negro student population of 72.5%, reflecting an increase in seven years of 8,742 students and a percentage increase of Negro students of 17.4%. During the school year 1967-1968, there were 249 administrative and supervisory positions (superintendents, principals and vice-principals, senior and junior high school principals, etc.), of which 27, or 10%, were held by Negroes. On August 22,

1. The Civil Rights Act of 1964, 42 U.S.C. §1983 (1964), Civil action for deprivation of rights—

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress.

1968, only one Negro each for principal and vice-principal was eligible on the promotional list and of the 72 principals in the system none were Negro and 67 vice-principals, 64 were white and 3 Negro.

On February 1, 1967, School Board of the City of Newark entered into a contract with the Teachers Association.[2]

Under date of May 28, 1968, defendant Board of Education passed a resolution suspending and abolishing the making of appointments from this list and instead the defendant, Franklyn Titus, Superintendent of the School System in Newark, presented certain recommendations for the appointments of principals, vice-principals, senior and junior high school principals, which the Board adopted, representing a total of 35 white appointments and 20 Negro appointments.[3] The appointments were designated as temporary appointments and the Board was to later review the appointments recommended, the criteria to be used by the Board having not as yet been

2. Under the terms of the contract, it was required:

"A. The positions of principal, vice principal, head teacher, department chairman and counsellor shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examination. Appointments to the position of teacher to assist principal (formerly called Administrative Assistant) shall be made annually on a temporary basis if the Superintendent determines that such a position is necessary or desirable, and all appointments to such position shall be made in order of numerical ranking from the appropriate vice-principal's list if such a list exists.

"B. Such examinations shall be given at regularly scheduled intervals and shall be adequately publicized in every school at least sixty (60) days in advance.

"C. All openings for the positions of supervisor, assistant supervisor and director and all positions hereafter created in new categories not existing shall be adequately publicized in every school at least sixty (60) days before the appointment is made and the qualifications for the positions shall be clearly set forth."

3. A breakdown of these recommendations is as follows:

finalized. In his recommendation to the Board the Superintendent candidly admitted that color was one of the criteria which he utilized, contending that the pattern by which principals, vice-principals and others were appointed reflected an era in 1953, when the promotional list was adopted, and as of 1968, conditions had so changed in the Newark School System that the promotional list had become outmoded by virtue of the changing population, community-wise and in the school system, which had occurred since its adoption.

This action was begun by a motion for summary judgment on the pleading, but the lower court denied it and ordered a full evidentiary hearing at which both sides were heard at great length. Superintendent Titus, one of the defendants, stated as one of his reasons for the abolition of the promotional list the fact that the Newark Public School System, especially in reading, was well below the national norm which obtained throughout the country; that there was such a great imbalance in the principal and vice-principal positions that, in his professional judgment, he felt that by adding a Negro who was qualified to these important positions, thus making the faculty more integrated, would the more readily lend itself to an upgrading of the Public School System in Newark. Although, as has been indicated, color was frankly admitted by all the witnesses for the appellees as

Level	Acting Position	White	Negro
Elementary	Principal	1	4
	Vice Principal	0	2
	Teacher to assist Principal	3	1
Secondary	Principal, Senior High	2	0
	Principal, Junior High	1	0
	Vice Principal, Senior High	8	4
	Vice Principal, Junior High	3	0
	Teacher to assist Principal	3	8
	Department Chairman	11	0
	Supervisory Assistant, Junior High	3	1
Total		35	20

being one of the factors in the selection of the principals and vice-principals, and one Simeon Moss, who was the assistant superintendent for elementary education who made the recommendations to the Superintendent for the appointments, stated that color was a prime factor, it was not the only factor, as the procuring of qualified individuals was the real objective.[4] Plaintiffs' position was that this use of color in the selection of principals and vice-principals and the device used to achieve that selection by abolition or suspension of the promotional list was a violation of their Constitutional rights under the Fourteenth Amendment.

With this contention we do not agree. State action based partly on considerations of color, when color is not used per se, and in furtherance of a proper governmental objective, is not necessarily a violation of the Fourteenth Amendment. Proper integration of faculties is as important as proper integration of schools themselves, as set forth in

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4. The findings of fact in the district court opinion, 302 F. Supp. at 732-733, include the following:

> "A fair evaluation of the record supports the conclusion that the promotional lists were suspended and the examination system abolished, not simply to appoint Negroes to promotional positions, but to obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population. . . .
>
> * * *
>
> "The Court is satisfied that in abolishing the examination procedure, there was no intention on the part of the Board to discriminate against white persons or exclude them from consideration for promotional positions. No inference of any such intention can be gleaned from the record. The testimony of several of the witnesses . . . shows that, despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system. There is nothing in the record to indicate that the Board was attempting to appoint Negroes in numbers proportionate to the school population."

Brown v. Board of Education, 349 U.S. 295 (1955), the thrust of which extends to the selection of faculties. In *Kemp v. Beasley*, 389 F.2d 178 (1968), the court held, at 189, where race was a consideration in the selection of teachers and faculties, "We reaffirm the principle that faculty selection must remain for the board and sensitive expertise of the School Board and its officials." And, at page 190, "The question thus becomes, when is there such faculty distribution as to provide equal opportunities to all students and to all teachers—whether white or Negro? Students in each school should have the same quality of instruction as in any other school. Every predominantly Negro school should have, wherever possible, substantially as integrated a faculty as the predominantly white school."

Again, in *Springfield School Committee v. Barksdale*, 348 F.2d 261, 266 (1965), the court stated, "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race insofar as race correlates with proven deprivation of educational opportunity." Further, in *United States v. Jefferson County Board of Education*, 372 F.2d 836, 895 (1966), it was stated, "As to faculty, we have found that school authorities have an affirmative duty to break up the historical pattern of segregated faculties, the hall-mark of the dual system."

It would therefore seem that the Boards of Education have a very definite affirmative duty to integrate school faculties and to permit a great imbalance in faculties—as obtained on August 22, 1968, when a new plan was proposed to the School Board in Newark for the increasing of qualified Negro administrators—would be in negation of the Fourteenth Amendment to the Constitution and the line of cases which have followed *Brown v. Board of Education, supra.*

We concur in the carefully considered opinion of Chief Judge Augelli, dated August 14, 1969, wherein he made findings of fact and conclusions of law pursuant to

Federal Rule of Civil Procedure 52a (*Porcelli v. Titus*, 302 F. Supp. 726 (District of New Jersey 1969)). He also entered a final order dismissing the complaint with prejudice on September 17, 1969.

The judgment of the lower court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,286 through 18,290

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO and JOSEPH CHAGNON,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark and THE BOARD OF EDUCATION OF NEWARK, IN THE CITY OF ESSEX,

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES,
Intervenors (in D.C.).

VICTOR PORCELLI, Appellant in No. 18,286

ARTHUR SHAPIRO, Appellant in No. 18,287

ALLAN M. COHN, Appellant in No. 18,288

MAXINE F. EDELSTEIN, Appellant in No. 18,289

HELEN R. JUSTIN, Appellant in No. 18,290

(D. C. Civil Action No. 864-68)

Appendix B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present:

GANEY, VAN DUSEN and GIBBONS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 15, 1969, be, and the same is hereby affirmed, with costs taxed in favor of appellees.

ATTEST:

THOMAS F. QUINN,
Clerk

September 23, 1970

APPENDIX C

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

CIVIL ACTION No. 864-68

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO and JOSEPH CHAGNON,

Plaintiffs,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark and THE BOARD OF EDUCATION OF NEWARK, IN THE COUNTY OF ESSEX,

Defendants,

and

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES,

Intervenors.

Appendix C

Appearances:

BRACKEN & WALSH, ESQUIRES,
Attorneys for plaintiffs,
By: JOSEPH WALSH, ESQUIRE;

VICTOR A. DEFILIPPO, ESQUIRE,
Attorney for defendants;

HARRIS DAVID, ESQUIRE,
Attorney for Intervenors.

AUGELLI, Chief Judge:

Plaintiffs, ten white teachers employed by the Newark Board of Education, bring this action under the Civil Rights Act, 42 U.S.C.A. §1983, alleging that the defendants, in appointing elementary school principals and vice-principals, discriminated against them because of their race. This Court has jurisdiction under 28 U.S.C.A. §1343.

Preliminarily, plaintiffs moved for a partial summary judgment on the issue of liability. That motion was denied without prejudice and the Court, in order to expedite the matter, directed that a plenary hearing be held on all issues. Thereafter, the Court allowed Bertram Coppock, Theresa David and Charles Haynes to intervene in the action, as defendants, for the purpose of presenting evidence in support of the action taken by the Board of Education in this case. The Court has also permitted the American Civil Liberties Union and The Law Center for Constitutional Rights to file an amicus brief, wherein it is argued that the complaint should be dismissed. A request for a jury trial, originally requested by plaintiffs, was later withdrawn.

Appendix C

The basic facts are not in dispute and have been stipulated by plaintiffs and defendants. Many of the facts so stipulated have been accepted by the intervenors. It appears that on February 1, 1967, the Newark Board of Education entered into an agreement with the Newark Teachers' Association. This agreement, which was to run until February 1, 1970, in Article X thereof, dealing with promotions, provides:

> A. The positions of principal, vice principal, head teacher, department chairman and counselor shall be filled in order of numerical ranking from the appropriate list, which ranking shall be determined by written and oral examinations. Appointments to the position of teacher to assist principal (formerly called Administrative Assistant) shall be made annually on a temporary basis if the Superintendent determines that such a position is necessary or desirable, and all appointments to such position shall be made in order of numerical ranking from the appropriate vice principal's list if such a list exists.
>
> B. Such examinations shall be given at regularly scheduled intervals and shall be adequately publicized in every school at least sixty (60) days in advance.

On June 30, 1967, the Board of Education amended its rules and regulations to conform to the provisions of said agreement of February 1, 1967, and Article X thereof. Pursuant to the agreement and the amended rules and regulations, there was in existence, on May 28, 1968, a Principal's List and a Vice Principal's List which contained the names and ranks of persons eligible for pro-

motion by virtue of the scores made by them in the promotional examinations.[1]

On May 28, 1968, the Board adopted a resolution suspending all appointments from the existing lists, "pending an evaluation by the Board of Education of the present procedure for making such appointments, effective after October 1, 1968." At the same time, it was stated that "the examination for principals and vice principals would be held on June 8, 1968 as scheduled. However, no appointments would be made from the lists established by those examinations until the Board has decided how it wished to proceed."[2]

On August 22, 1968, defendant Titus recommended that the Board adopt a new procedure for making appoint-

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[1] With respect to the Principal's List, persons listed in positions 1 through 15 had already been appointed. Plaintiffs Porcelli, Bigley and Shapiro appear on the list as eligible persons who had not been appointed. As to the Vice Principal's List, persons listed in positions 1 through 36 had already been appointed. Plaintiffs Cohn, Justin and Edelstein were eligible for promotion, but had not been appointed. Plaintiffs Hickey, Dunne, LaRusso and Chagnon do not appear on any existing promotion list. LaRusso and Chagnon had been appointed from the Vice Principal's List prior to May 28, 1968.

[2] Plaintiffs, Dunne, Hickey, Chagnon and LaRusso, all took the examinations given on June 8. Their names appear on the score sheet for Elementary Principal. In addition, Dunne's name appears on the score sheet for the position of Vice Principal.

ments to promotional positions.[3] This recommendation

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[3] The new procedure, as set out in one of the exhibits marked in evidence, is as follows:

PROCEDURE FOR ESTABLISHING A POOL OF CANDIDATES FOR PROMOTIONAL POSITIONS

1. Candidates shall submit a formal application.

2. Candidates in order to be eligible for inclusion in the pool shall meet training, experience, and State certification requirements as established for each promotional position. These requirements must be met prior to interview by the screening committee.

The following are minimum experience requirements:

a. For Principals:

Five years of successful contractual teaching experience in the Newark Public Schools, or ten years of successful contractual teaching experience in schools outside of Newark, three years of which shall have been on a recognized administrative level.

b. For Vice Principals, Department Chairmen, and Junior High School Supervisory Assistants:

Three years of successful contractual teaching experience in the Newark Public Schools (with the attainment of tenure).

3. Candidates for the pool shall not be restricted to members of the Newark Public School staff.

4. Candidates shall be screened by a committee composed of:

a. Assistant Superintendent in charge of Personnel or a Director on his staff.

(*Footnote continued on following page*)

Appendix C

(*Footnote continued from preceding page*)

b. Assistant Superintendent from the appropriate school level.

c. A Newark school administrator from the appropriate level.

d. An educator from outside the Newark school system.

e. A Newark school teacher from the appropriate school area. No teacher shall serve on a screening committee who is a candidate for promotional position.

5. The screening committee shall recommend to the Superintendent those candidates judged to be worthy candidates for promotion. These successful candidates shall constitute the pool from which promotions shall be made.

6. The criteria for use by the screening committee shall be co-operatively developed by representatives of the N.T.A. and the Superintendent's staff.

7. New candidates shall be selected for the pool once each year in March.

8. The pools shall be in existence for a period of five years from the date of their establishment. At that time this entire procedure will be subject to re-evaluation.

9. As a result of negotiations with the N.T.A., it is recommended that all individuals who were on unexpired promotional lists, upon their request, be automatically placed in the pool for the appropriate area without prejudice. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel.

10. As a result of negotiations with the N.T.A., all individuals who applied and paid the required fees for participation in the examinations which have been suspended by the Board of Education shall automatically be considered as having applied for inclusion in the pool. It is further agreed that all such individuals will be sent notices to this effect by the Department of Personnel. It is also recommended that all such fees for the suspended promotional examinations be returned.

was adopted by the Board. It is stipulated that on the same day, August 22, the Board made 55 temporary or acting appointments. Of these appointments, 35 went to whites and 20 to Negroes. None of the plaintiffs were included in the Principal and Vice Principal appointments made on that day.

Plaintiffs' complaint, in essence, is that defendants, acting under color of law, abolished the examination procedure for the purpose of appointing Negroes to positions for which they would not otherwise be eligible. They allege that appointments were made to these positions solely on the basis of race, and that plaintiffs were discriminated against solely because they are white. Plaintiffs seek damages in the sum of $500,000.00, and a "mandatory permanent injunction against the defendants herein, prohibiting them from taking any punitive measures against the plaintiffs on account of their race or for enforcing their civil rights under this action."

It is the defendants' position that the abolition of the examination system was a legitimate governmental action taken by the Board of Education to improve promotional procedures, and that such step was not taken for the purpose of favoring or restricting promotional appointments to black educators. Defendants also contend that there is no support in the record for a conclusion that the Board discriminated against white educators in making promotional appointments. They further argue that even if the Court should find that the purpose behind the abolition of the examination system was to make available more Negroes for promotional appointments, this was a legitimate goal of the Board in light of the past racial imbalance that existed in the administrattive ranks of the Newark school system. The

intervenors join in these arguments. In addition, they argue that the Board had a positive and affirmative duty to appoint Negro administrators because the Board had, in the past, practiced racial discrimination to exclude Negroes from these administrative positions.

The Civil Rights Act, pursuant to which plaintiffs assert a cause of action in this Court, prescribes two elements as requisite for recovery: (1) the conduct complained of must have ben done by some person acting under color of law; and (2) such conduct must have subjected the complaining party to the deprivation of rights, privileges, or immunities secured to him by the Constitution and laws of the United States. *Basista* v. *Weir,* 340 F. 2d 74 (3 Cir. 1965). The Newark Board of Education is a body corporate, N.J.S.A. 18A:10-1, which may sue and be sued, N.J.S.A. 18A:11-2, and is amenable as a "person" to suit under 42 U.S.C.A. §1983. *School Board of City of Charlottesville* v. *Allen,* 240 F. 2d 59 (4 Cir. 1956).

It is clear that racial discrimination in a state or municipal school system violates the equal protection clause of the Fourteenth Amendment. *Brown* v. *Board of Education,* 347 U. S. 483 (1954). This proscription applies equally to the employment and assignment of teachers, as it does to pupil discrimination. *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275 (4 Cir. 1967); *Smith* v. *Board of Education of Morrilton School District,* 365 F. 2d 770 (8 Cir. 1966). There is no reason to assume that it does not apply with equal force to the promotion of teachers to positions of principal and vice principal and other administrative posts. *Cf. In the Matter of the Application of the Council of Supervisory Associations of the Public Schools of New York City,* 23 N. Y. 2d 458, N. E. 2d 204 (1969).

Appendix C

It cannot be denied that the Newark Board of Education, under N.J.S.A. 18A:27-4, has the power to promulgate rules and regulations governing the promotion of teachers to administrative positions and to determine the criteria to be utilized in making such promotions, provided it does not practice racial discrimination. See decision rendered by the New Jersey Commissioner of Education on December 13, 1968, in *Porcelli* v. *Titus*, referred to in note 4 of this opinion. In *Kemp* v. *Beasley*, 389 F. 2d 178 (8 Cir. 1968), the court noted that the primary responsibility for faculty selection must remain with the various Boards of Education and their officials, who have "broad and sensitive experience" in the area. There appears to be no state law requiring that promotions to such positions as principal or vice principal be made on the basis of competitive examinations. This would seem to be solely a matter of contract between the Board and the teachers it employs. This Court, of course, is not concerned with any possible claim plaintiffs may have against the Board arising out of the contract of February 1, 1965. Similarly, the Court is not considering whether the Board had the power, in the abstract sense, to reconsider existing promotional procedures and alter them.[4] The sole question for decision

[4] In the course of the present litigation, plaintiffs submitted this issue to the New Jersey Commissioner of Education. On October 22, 1968, the Commissioner, in a printed decision, held that the issue was not yet "ripe for adjudication" and remanded the matter to the parties "for whatever procedures may be appropriate toward a harmonious settlement of this controversy." On November 13, 1968, on appeal from that decision, the State Board of Education remanded the matter to the Commissioner

(Footnote continued on following page)

is whether or not plaintiffs have established by a preponderance of the evidence that the Board suspended the existing promotional procedures for the purpose of discriminating against white applicants, and particularly, the plaintiffs in this case. Stated another way, did the Board discriminate against plaintiffs because they are write?

The parties have stipulated that there was, and is, racial imbalance on the administrative level in the Newark school system. Paragraphs 4 and 5 of the stipulation read as follows:

> 4. The school population in the City of Newark in October 1961 was 67,134, and had a Negro population of 55.1%. In September 1968 the total school population was 75,876, with a Negro student population of 72.5%, reflecting an increase in seven years of 8,742 students and a percentage increase of negro (sic) students of 17.4%.
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> 5. For the school year 1967-1968 there were 259 administrative and supervisory positions (Super-

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(*Footnote continued from preceding page*)

with a directive to render a decision within one month. Pursuant to this mandate, on December 13, 1968, the Commissioner decided that the actions taken by the Newark Board of Education were appropriate and were therefore sustained as a legitimate exercise of the power vested in that body by New Jersey law. In passing, the Commissioner noted that the issue of racial discrimination was being pressed in the federal courts and therefore made no findings with respect to that issue. However, he observed that "the mere consideration of the factor of race is not *per se* in conflict with established constitutional principles", citing for support *Morean* v. *Board of Education of Montclair*, 42 N.J. 237 (1964) and *Fuller* v. *Volk*, 230 F. Supp. 25 (D.N.J. 1964).

intendents and Assistants, directors of departments, Supervisors; Senior High, Junior High, Elementary, Special Schools; principals and vice-principals, department chairmen; supervisory assistants and teachers to assist principals), of which 27, or 10% were held by negroes (sic).

It was also stipulated that of the 72 Principal positions in existence in the Newark school system prior to August 22, 1968, none were held by Negroes. Also, with respect to 64 Vice Principal positions, only 3 were held by Negroes. And of the 48 Department Chairman positions, only 1 was held by a Negro. The proofs also show that there have been only 4 Negro principals and vice principals and 1 Negro department chairman in the history of the Newark school system.

In the main, the evidence adduced in behalf of plaintiffs consisted of a number of exhibits and the testimony of witnesses taken on oral deposition. The exhibits show, as has already been stated, the action taken by the Board of Education on May 28 and August 22, 1968; the promotional procedures that existed prior to May 28; those persons eligible for promotion by virtue of their scores on the promotional examinations given prior to May 28; and the results of the written promotional examinations given in June, 1968, which examinations were not utilized in making appointments. Plaintiffs contend that the exhibits, and the testimony of the several witnesses examined on oral deposition, establishes that defendants took into consideration the color of the applicants' skin as one of the criteria in recommending and appointing persons to fill positions as acting principals and vice principals, and that the purpose behind the Board's suspension of the ex-

isting promotional lists, and in abolishing the examination system for appointing principals and vice principals, was to make more Negroes available for promotion and to discriminate against the white plaintiffs because of their race.

It is apparent that while the promotional lists were in effect, the number of Negroes available for promotion to positions of principal and vice principal was limited. For example, on the Principal's List (P-3 in evidence) and the Vice Principal's List (P-4 in evidence), only 1 Negro appeared on each list as being eligible for promotion. Defendant Titus, the Superintendent of Schools, admitted that until the Board suspended the existing lists, few, if any, Negro principals could be appointed. Mrs. Gladys Churchman, a member of the Board of Education, testified that, in order to appoint qualified Negroes, it was necessary to suspend the promotional lists. Two other members of the Board, Gerard F. McCune and John Cervase, testified to the same effect, as did the Board's president, Harold Ashby.

The testimony also revealed an overall dissatisfaction on the part of members of the Board and members of the administrative staff with the examination procedure for making procedures. Defendant Titus testified that "the examination procedure as it has existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership. * * * I felt that in 20 years, 25 years that had elapsed since the procedure was first or originally modified or developed, the conditions in the City had changed, educational philosophy had changed. There was a high (sic) premium on sensitivity that had existed hitherto. And for that reason I welcome

the opportunity of reviewing the whole procedure. * * * Sensitivity, as I see it, is that element of a person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to educational needs that go (sic) out of the deprived conditions in many of our—most of our school neighborhoods. * * * As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand." In fact, Superintendent Titus testified that he never equated "high standing on an examination procedure with the ability to successfully administer a school."

There was also testimony by Benjamin Epstein, Assistant Superintendent of Schools in charge of secondary education. He stated that in his opinion, the judgment of qualified and experienced administrators at the head of a school system can be as effective as an examination procedure in selecting personnel. Mrs. Churchman, the Board member previously mentioned, expressed the view that the Newark school system was "losing good people because of the exam procedure", and that the suspension of the promotion lists would "provide an avenue for people who were not on the list who did not pass the exam, whether they were white or black, to be able to be appointed." On the other hand, Board member Cervase testified that in his opinion, "the best way to get qualified administrators was through the examination procedure. In any event, on May 28, 1968, the Board, by a vote of 5 to 3, suspended the appointment of persons from the existing promotional lists.

Appendix C

The record makes it clear that "race", in its broadest connotation, played a part in the Board's decision to suspend the promotion lists and abandon the examination system. Most, if not all, of the witnesses, in the course of their testimony, mentioned the paucity of Negro administrators in the Newark school system. Plaintiffs admit that, in the numerical sense, there was a racial imbalance in the administrative ranks of the Newark school system. Defendant Titus testified that he favored suspension of the promotional lists because such lists "didn't represent the kind of racial mix that I feel is most important in accomplishing an educational program in the City of Newark." Similar views were expressed by Board members and other witnesses. In short, there was an awareness of the racial problems, frequent discussions about the lack of non-white administrators, and the need to obtain qualified black administrators.

A fair evaluation of the record supports the conclusion that the promotional lists were suspended and the examination system abolished, not simply to appoint Negroes to promotional positions, but to obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school populatoin. The racial breakdown of the Newark schools, as stipulated by the parties, has been set forth earlier in this opinion. In support of the claim that an "educational crisis" exists in Newark, Dr. Donald Wesley Campbell, Director of Reference and Research for the Newark Board of Education, testified regarding certain statistical surveys made by his department. These surveys revealed that, on the reading level, the median score achieved by Newark school children tested in the third grade, ranged from 5 months

to one year and 3 months below the national median; that the median score achieved by Newark school children, again tested for reading, in the sixth grade, ranged from 1 year and 1 month to 2 years below the national median; and that in the level of arithmetic achievement of Newark school children in the seventh grade, their scores ranged from 1 to 2 years below the national median. It is obvious that the inability to read well will result in poor achievement in all studies.

Dr. Richard Trent, Associate Professor of Urban Education, and Executive Officer of the Education Opportunity Program at Brooklyn College, University of the City of New York, testified that the median scores achieved by the Newark school children, considered in conjunction with the racial composition of the Newark schools, the dropout rate in the system, and the number of principals who are Negro, indicated to him that "if you want significant change in the school performance of the ghetto population, it is highly advisable to involve as much as you can competent black professionals * * *." Dr. Trent further testified that the presence of a black man in authority is evidence to the children that if they study, they, too, can achieve. In addition, he stated that it is easier for a Negro to discipline ghetto children, and for a Negro to involve Negro parents in the educational process. This witness stressed, however, that it is more important that the individual be qualified than that he be black, and that in some circumstances a white person would be able to fulfill these requirements. Dr. Trent's testimony is relevant in this case because the record discloses that these are precisely the concepts that motivated the Board in the actions it took.

Appendix C

The Court is satisfied that in abolishing the examination procedure, there was no intention on the part of the Board to discriminate against white persons or exclude them for consideration for promotional positions. No inference of any such intention can be gleaned from the record. The testimony of several of the witnesses, some of which has been recited in this opinion, shows that, despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system. There is nothing in the record to indicate that the Board was attempting to appoint Negroes in numbers proportionate to the school population.

The Court is in agreement with plaintiffs' argument that the selection, placement, retention, or promotion of teachers in such a way as to create or perpetuate all white or all black schools, violates the equal protection clause of the Fourteenth Amendment. This is the fundamental teaching of the cases cited by plaintiffs. *Rolfe* v. *County Board of Education,* 391 F. 2d 77 (6 Cir. 1969); *Kemp* v. *Beasley,* 389 F. 2d 178 (8 Cir. 1968); *Kelly* v. *Altheimer,* 378 F. 2d 483 (8 Cir. 1967); *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275 (4 Cir. 1967); *United States* v. *Jefferson County Board of Education,* 372 F. 2d 836 (5 Cir. 1966); *Smith* v. *Board of Education of Morrilton School District,* 365 F. 2d 770 (8 Cir. 1966). However, these cases involved factual situations completely different from the facts in the case at bar. They arose in areas where, as a result of attempts to desegregate schools, the need for black teachers in previously all-Negro schools was decreased. Thus, black teachers were dismissed summarily, indicating that they were not hired

as teachers in a school system, but rather as black teachers in a black school system. But in Newark, there is a fully integrated school population on the student and teacher level. There is not claim that a dual system exists in Newark. In fact, the record would indicate that most of the schools are predominantly populated by non-white children. In such a situation, and in light of the evidence adduced in court that the absence of meaningful representation on the administrative level was retarding the educational development of the school population, the action taken by the Board in this case can only be viewed as a legitimate function of the Board. *Cf. Fuller* v. *Volk,* 230 F. Supp. 25 (D. N. J. 1964); and same case, 250 F. Supp. 81; *Olson* v. *Board of Education,* 250 F. Supp. 1000 (E. D. N. Y. 1966). And this is especially so where the proofs fall short of showing that qualified white applicants were excluded from consideration or discriminated against.

Consideration will now be given to the appointments made by the Board on August 22, 1968. It must be stressed that these were only temporary or acting appointments. The person so appointed receives remuneration above that received before promotion ($75.00 to $100.00 a year above his normal salary), but his position does not become permanent until the Board takes further action. An acting position exists for a one year period. There was a great deal of testimony concerning the method by which these acting appointees were selected.[5] From

[5] It should be noted that there is no allegation by plaintiffs, nor any indication in the record, that white persons serving in administrative positions were removed therefrom in order that new appointments be made. Persons selected for advanced acting posi-

(*Footnote continued on following page*)

the record it appears that the selection procedure began in late June or early July in 1968. The initial recommendations for the temporary or acting appointments were made by the Assistant Superintendents, and they covered positions on the junior high and high school level, as well as on the elementary level. These recommendations would then be discussed with the Deputy Superintendent of Schools and thereafter checked to see if the applicants were properly certified. A list of the recommended persons would then be submitted to the Superintendent, defendant Titus, who would then make his recommendations to the Board, which took the necessary formal action of making the appointments. The record indicates that the Board members made no independent evaluation of the candidates recommended, but relied upon the expertise of the Superintendent and his staff in appointing those persons whose names were submitted.

As has already been indicated, defendants admit that one of the criteria used in making the appointments in the instant case was the color of the applicant's skin. However, this does not, in and of itself, demonstrate discrimination against white applicants. In fact, the record shows that the Board has no intention of limiting appointments to Negroes, or that consideration was given

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(*Footnote continued from preceding page*)

tions were not screened and chosen from a pool as mentioned in footnote 3 of this opinion. This system was not put into effect because, soon after the examination system was abolished, the parties agreed to maintain the status quo, pending a determination by this Court of the legality of the actions taken by the Board. However, when the time comes to make permanent appointments, the screening and pool procedures are intended to be fully utilized.

only to black applicants. The great preponderance of the evidence supports the contention of defendants that the persons recommended and eventually appointed were considered by the appointing authority to be the best qualified individuals for the available positions. Indeed, when the Board considered the recommendations of the Superintendent and his staff, some members of the Board were not even aware of the race of those whom they voted to appoint.

As previously stated the Board, on August 22, 1968, made 55 temporary or acting appointments.[6] Of that number, 35 positions were filled by white persons and 20 by Negroes. Especially relevant is the fact that on

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[6] It has been stipulated that the racial breakdown of the appointments made on August 22, 1968, is as follows:

Level	*Acting Position*	*White*	*Negro*
Elementary	Principal	1	4
	Vice Principal	0	2
	Teacher to assist Principal	3	1
Secondary	Principal, Senior High	2	0
	Principal, Junior High	1	0
	Vice Principal, Senior High	8	4
	Vice Principal, Junior High	3	0
	Teacher to assist Principal	3	8
	Department Chairman	11	0
	Supervisory Assistant, Junior High	3	1
Total		35	20

the secondary level, where no promotional lists existed, 31 white applicants and 13 Negroes were appointed. Plaintiffs urge the Court to ignore the appointments made on the secondary level and to only consider those made on the elementary level, where of the 11 appointments made, 7 went to Negroes. This the Court declines to do. Plaintiffs are challenging certain actions taken by the Board, which they claim is unlawful and discriminatory as to them. The Court is of the opinion that the action taken by the Board must be viewed as a whole in evaluating the charge of discrimination. If it was the intention of the Board to discriminate against white applicants, it would have been a simple matter to accomplish this in connection with the secondary level appointments, where no promotion lists existed. However, the appointments actually made, considered in light of the record, clearly rebuts any motivation or intention on the part of the Board to discriminate against qualified white persons in making promotions.

Relating the Board's action of August 22, 1968 to the plaintiffs' the record, taken as a whole, indicates clearly that they were not excluded from promotional positions because of their race. Plaintiffs argue that because they were not appointed to available elementary positions, and some Negroes were, the fact that race was considered by those making the recommendations for appointments, is proof of discrimination. To be sure, 7 Negroes were appointed to elementary positions, but so were 4 white persons. Surely, racial consideration did not affect the selection of these four individuals over plaintiffs. Moreover, the record reflects that plaintiffs Justin and Cohn were appointed to the administrative positions of Teacher to Assist Principal on August 22. The appointment of

white applicants, some of whom appeared on promotion lists, and some of whom did not, and the failure to appoint other white applicants whose names appeared on promotion lists, might arguably lend support to the statements appearing in the record, that the examination system did not necessarily supply persons possessing the qualifications deemed essential for promotion by the Superintendent and his staff. Be that as it may, when the time comes for the Board to make permanent appointments to available administrative positions, those plaintiffs whose names appear on the promotional lists are assured of consideration under the "pool" provisions of the memorandum set forth in note 3 of this opinion. It cannot and will not be assumed that this pool procedure will be utilized in such manner as to discriminate against those persons who have been placed in the pool because of their standing on prior examinations.

As to those plaintiffs whose names do not appear on existing promotional lists, there is nothing in the record to cause the Court to assume that future promotions will not be made on the basis of merit. It is true that the criteria of appointments to promotional positions had not yet been established when this case was heard, but it is the Court's understanding that such criteria will be be worked out by the Superintendent and his staff and representatives of the Newark Teachers' Association. There is no reason to believe that when such criteria are established, appointments will not be made in a manner that will provide the Newark school system with persons best qualified to perform their respective tasks. It is not the function of this Court to determine the educational soundness of the action taken by the Board in this case. It is sufficient to state that the Board had the authority

to take such steps as it deemed necessary and proper to promote the educational welfare of the Newark school community. Of course, in taking such steps, the Board could not infringe upon the right of white teachers to be free from discrimination because of race. *Cf. Shelton* v. *Tucker,* 364 U. S. 479, 485 (1960); *Kemp* v. *Beasley,* 389 F. 2d 178, 189 (8 Cir. 1968); *In the Matter of the Application of the Council of Supervisory Associations of the Public Schools of New York City,* 23 N. Y. 2d 458, 45 N. E. 2d 204, 208-210 (1969). On the basis of the record in this case, the Court finds that plaintiffs have not established by a preponderance of the evidence that racial discrimination was intended or practiced against them. This finding makes it unnecessary for the Court to consider the evidence presented by the intervenors in an attempt to show that, in the past, the promotional examinations were conducted in such a way as to discriminate against Negroes. The Court makes no finding on this issue.

It might not be amiss to make some reference to that phase of plaintiffs' prayers for relief wherein they ask for an injunction to prohibit defendants "from taking any punitive measures against the plaintiffs on account of their race or for enforcing their civil rights under this action." There is no need for any such injunction. Plaintiffs had every right to bring this action. Any reprisal for doing so would subject the persons responsible to severe penalties. See *Johnson* v. *Branch,* 364 F. 2d 177 (4 Cir. 1966). This Court does not for one moment believe that defendants will take any such punitive measures.

For the reasons stated herein, the complaint will be dismissed with prejudice, but without costs. Counsel for

defendants will please submit an appropriate order consented to as to form by counsel for plaintiffs and intervenors, or bring on a motion for settlement of form of order to be entered, on notice.

This opinion shall constitute the Court's findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure.

APPENDIX D

Entire Record of the District Court on File as Certified

[NOT REPRODUCED HERE]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 850

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LaRUSSO and JOSEPH CHAGNON,

Petitioners,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX,

and

BERTRAM COPPOCK, THERESA DAVID and CHARLES HAYNES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENTS, FRANKLYN TITUS AND THE BOARD OF EDUCATION OF NEWARK, IN OPPOSITION

Citations to Opinions Below

The opinion of the District Court is reported in 302 F. Supp. 726 (1969) and printed in Appendix C p. 10(a), petition for certiorari.

The opinion of the Court of Appeals, Third Circuit, is as yet unreported officially; it is printed in Appendix A p. 1(a), petition for certiorari.

Jurisdiction

As alleged in the petition for certiorari, the jurisdiction of this court is invoked under 28 U.S.C.A. Section 1254(1).

Questions Presented

The petition for certiorari states that the decision rendered below is in direct conflict with other Circuits, and to that end presented five questions for review. These questions are incorrectly and improperly presented, because the factual situation of the case at bar is clearly distinguishable from the cases decided in other Circuits, while the principle of law enunciated in other Circuits has been correctly applied in the instant matter.

The question as it should be stated is:

1. Can a Board of Education, in pursuance of a legitimate governmental objective, employ, assign and promote personnel on a color conscious basis in order to insure integration and equal educational opportunities, in compliance with the equal protection clause of the Fourteenth Amendment?

The Constitutional Provision Involved

The constitutional provision involved is the equal protection clause of the Fourteenth Amendment, section 1, which provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statutes Involved

The statement of statutes involved, contained in the petition for certiorari, is complete.

Statement of the Case

This matter was commenced under the Civil Rights Act 42 U.S.C.A., Section 1983, by ten white teachers in the employ of the Newark Board of Education, alleging deprivation of their right of promotion by reason of the fact that they were white.

The matter was heard before Judge Anthony T. Augelli in the United States District Court, for the District of New Jersey, without a jury. The only issue considered at the time was whether the Newark Board of Education did discriminate against petitioners because they were white.

Upon completion of the plenary hearing, the lower court dismissed the complaint, with prejudice, in an opin-

ion setting forth the findings of fact and conclusions of law under Rule 52(a) of the Federal Rules of Civil Procedure.

The factual allegations of the parties are not in dispute and to that end were consented to and filed with the trial court as a complete and comprehensive statement of the facts, as follows:

1. On February 1, 1967 the Newark Board of Education entered into an agreement with the Newark Teachers Association running until February 1, 1970.

2. The Newark Board amended its rules and regulations to conform with the agreement dated February 1, 1967, by its amendment of June 30, 1967, subject to law.

3. Both the rules and regulations and the agreement provided for written and oral examinations for promotion positions of principal and vice-principal. The rules and regulations provided for the continued maintenance of a list in numerical order of persons to fill vacancies in the positions existing for principal, vice-principal and teacher to assist the principal.

4. The school population in the City of Newark in October 1961 was 67,134, and had a Negro population of 55.1%. In September 1968 the total school population was 75,876, with a Negro student population of 72.5%, reflecting an increase in seven years of 8,742 students and a percentage increase of Negro students of 17.4%.

5. For the school year 1967-1968 there were 249 administrative and supervisory positions (Superintendents and Assistants, directors of departments, Supervisors; Senior High, Junior High, Elementary, Special Schools; principals and vice-principals, department chairmen; supervisory assistants and teachers to assist principals) of which 27, or 10% were held by Negroes.

6. Under date of May 28, 1968 there was in existence a list in accordance with the contract and Board rules and regulations, from which persons were to be appointed to the positions of principal, vice-principal and teacher to assist the principal.

7. Under date of May 28, 1968 the defendant, the Newark Board of Education, passed a resolution suspending any appointments from said list, which list was due to expire on Oct. 1, 1968.

8. On August 22, 1968 the defendant, Franklyn Titus, presented a recommendation to the defendant, The Newark Board of Education. The Board, pursuant to its then existing rules, suspended the operation of its rules and adopted the recommendation of the Superintendent and abolished the numerical promotion list and the examination procedure then in existence. This was an entirely new promotional procedure, contrary to the prior Board rules and the agreement dated February 1, 1967.

9. On August 22, 1968 the defendants made temporary appointments to the positions of principal, vice-principal and teacher to assist the principals without following the numerical promotional list.

10. The defendants admit that one of the criteria utilized in making the appointments complained of was the color of the applicant's skin, and Assistant Superintendent Moss, who made the initial recommendation of names, admitted that it was one of his prime considerations.

11. The defendants admit, as a matter of fact, that the bases for their action were as follows (as contained in the testimony of the defendant Titus, given in depositions on September 9, 1968, more particularly at pages 8, 9 and 13):

"Q. You wanted black personnel and/or Puerto Rican personnel, if qualified, in some of the principalships in the school system of Newark; is that not correct? A. I felt that the examination procedure as it has existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership.

Q. Well, now, in your— A. I—

Q. Pardon me, sir. A. I felt that in 20 years, 25 that had elapsed since the procedure was first or originally modified or developed, the conditions in the City had changed, educational philosophy had changed. There was a high premium on sensitivity than had existed hitherto. And for that reason I welcome the opportunity of reviewing the whole procedure.

Q. What is this sensitivity to which you refer, Mr. Titus? A. Sensitivity, as I see it, is that element of person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to educational needs that go out of the deprived conditions in many of our—most of our school neighborhoods.

Q. Well, now, how would that have bearing in relation to a school promotional examination list? A. As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.

Q. Well, now, when you say 'has to be able to identify,' do you mean has to be able to identify with this 77 per cent about which you have spoken? A. Their needs, the minority group needs, the

minority group personality, the minority group reaction the whole question of attitude in all aspects of the kid's personality as relative to the white power structure.

* * *

Q. Well, where didn't it? A. Because it didn't represent the kinds of racial mix that I feel is most important in accomplishing an educational program in the City of Newark, that's all.

Q. Now, you said 'racial mix'. So that what you were looking for were black principals; isn't that correct? A. I certainly wanted black representation.

Q. And you couldn't put black principals in at the present time while this list was in existence, could you? A. Not until the Board suspended the list."

12. Defendants and plaintiffs agree that of the eleven acting appointments made to the elementary school positions on August 22, 1968, which are involved in this case, seven persons were black and four persons were white. Four Negroes were named as acting principals and one white person was so appointed; two Negroes were named as acting vice-principals and no white person was so appointed; one Negro was appointed as acting assistant teacher to the principal and three white persons were so appointed.

Also on August 22, 1968 at the same meeting referred to above the following acting appointments were made on the secondary level:

Senior High School Principals: Two white persons and no black persons.

Junior High School Principal: One white person and no black person.

Senior High School Vice Principals: Eight white persons and four Negroes.

Teachers to assist the Principals: Three white persons and eight Negroes.

Departmental Chairman: Eleven white persons and no Negroes.

Junior High School Supervisory Assistants: Three white persons and one Negro.

13. The plaintiffs and defendants agree that as part of the Agreed Statement of Facts, there is attached hereto and made a part hereof, two statistical documents, one entitled,* "Table I. Total Pupil Population of Newark Day Schools, September 1968 and October 1961, and Percent of Negroes on Roll", and: "Table II. Administrative and Supervisory Positions in Newark Day Schools and Per Cent Held by Negroes 1967-68 and October 1968."

The foregoing Statement of Facts clearly demonstrates the candor and forthrightness of the Newark Board of Education. It also illuminates today's problems of maintaining and operating a large urban school district and the educational considerations necessary to furnish an equal public education for all pupils in the school district.

Reasons for Not Granting the Writ

(a) The opinion of the Court of Appeals for the Third Circuit is not in conflict with other circuits, nor is it in

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* The two statistical documents referred to are attached to the Agreed Statement of Facts filed with the court.

conflict with the decisions of this court. The lower court correctly applied the decision of the United States Supreme Court in *Brown* v. *Board of Education,* 349 U. S. 294, 75 S. Ct. 753 (1958), which held in effect that integration of faculties and integration of schools are of equal importance. In order to accomplish the integration of faculties in conformity with the decision, it of necessity required that the respondent, Newark Board of Education, institute a method of faculty selection.

(b) The petitioners have cited cases in other circuits as being in conflict with the opinion of the Third Circuit, and also for the purpose of indicating that the respondents violated the equal protection clause of the Fourteenth Amendment. The cases of *Rolfe* v. *County Board of Education,* 391 F. 2d 77 (6 Cir. 1969), *Kemp* v. *Beasley,* 389 F. 2d 178 (8 Cir. 1968); *Kelly* v. *Altheimer,* 378 F. 2d 483 (8 Cir. 1967), *Wall* v. *Stanly County Board of Education,* 378 F. 2d 275 (4 Cir. 1967), and *Smith* v. *Board of Education of Morrilton School District,* 365 F. 2d 770 (8 Cir. 1966), while clearly enunciating the principle of equal protection under the Fourteenth Amendment, are inapplicable, since they involve factual situations which are distinguishable from the facts surrounding the action taken by the respondents. In those cases governmental authorities attempted to desegregate schools, and by so doing eliminated the need for black teachers in previously all Negro schools. The dismissal of the black teachers in those instances made it patently obvious that the black teachers were not hired as teachers in the various school districts, but rather as black teachers in an all black system. In the instant case the facts clearly indicate that in a predominantly populated non-white school system a sincere effort to produce meaningful representation on the administrative level was being achieved without excluding

white applicants from consideration for administrative posts.

(c) Not only is the opinion and ruling of the Court of Appeals of the Third Circuit in complete conformity with the rulings of the United States Supreme Court (*Brown* v. *Board of Education, supra*), but also with the rulings of other circuit courts. In *U. S.* v. *Jefferson County Board of Education,* 372 F. 2d 836 (1966), the court reviewed school desegregation plans to determine whether the plans meet constitutional standards; also to re-examine school desegregation standards in the light of the Civil Rights Act of 1964, and the guidelines of the U. S. Office of Education. The litigants contended that HEW and the courts cannot take race into consideration in establishing standards and guidelines. The court at p. 876 reacted as follows:

> "The constitution is both color blind and color conscious. * * * The criterion is the relevancy of the color to a legitimate governmental purpose."

And at p. 892 the court continued:

> "To prevent such harm or to undo the harm, or to prevent resegregation, the school authorities even in the administration of an otherwise rational nondiscriminatory policy, should take corrective action involving criteria."

However, petitioners allege that the action of the respondents in penalizing them because they are white citizens constitutes a violation of their rights. This admission appears to give rise to a contradiction in petitioners' position since they admit imbalance in their original complaint and any correction of imbalance would of necessity

mandate taking into account or to set up a classification by race, which in this case would constitute color. In effect the petitioners are holding that the worthiness of the objective even when admitted, may not be corrected where a classification by race is utilized by a governmental authority. This position was advanced in the matter of *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1965). There the school authorities of Springfield, Massachusetts had passed a resolution to take appropriate action to eliminate racial concentration in schools within the framework of effective educational procedures. In meeting this challenge the Court of Appeals of the First Circuit stated:

> "It has been suggested that classification by race is unlawful regardless of the worthiness of the objective. We do not agree. The defendants' proposed action does not concern race except insofar as race correlated with proven deprivation of educational opportunity. This evil satisfies whatever 'heavier burden of justification' there may be. Cf. *McLaughlin* v. *State of Florida,* (1964) 379 U. S. 184, 194, 85 S. Ct. 283, 13 L. Ed. 2d 222. It would seem no more unconstitutional to take into account plaintiffs' special characteristics and circumstances that have been found to be occasioned by their color than it would be to give special attention to physiological, psychological or sociological variances from the norm occasioned by other factors. That these differences happen to be associated with a particular race is no reason for ignoring them. (*Booker* v. *Board of Education* (1965), 45 N. J. 161, 212 A. 2d 1)."

To the same effect attention should be focused on the matter of *Offerman* v. *Nitkowski,* 378 F. 2d 22 (1967)

where the court considered not only the issue of classification by race as being *per se* unconstitutional, but relied upon *Brown* v. *Board of Education, supra.* The court, at p. 24 stated:

> "Consideration of race is necessary to carry out the mandate in *Brown,* and has been used as noted in cases following *Brown.* Where it is used to insure against rather than to promote deprivation of equal educational opportunities. We cannot conceive that our courts would find that the state denies equal protection to either race by requiring its school boards to act with awareness of the problem."

To further highlight the issue here presented, it is interesting to note that classification by race has been considered in areas other than education. In *Norwalk Core* v. *Norwalk Redevelopment Agency,* 395 F. 2d 920 (1968) the court was confronted with classification by race in order to implement and insure proper relocation for Negroes displaced to the same extent as white people. The argument presented was that setting standards to assure proper relocation is unconstitutional. In referring to the standards set for relocation the Court asserted as follows:

> "What we have said may require classification by race. That is something which the constitution usually forbids not because it is inevitably an impermissible classification but because it is one which usually to our national shame, has been drawn for the purpose of maintaining racial inequality. Where it is drawn for the purpose of achieving equality it will be allowed and to the extent it is necessary to avoid unequal treatment by race it will be required."

The court cites with approval *Hobson* v. *Hansen,* 269 Fed. Supp. 401 (1967), *Springfield School Committee* v. *Barksdale* (*supra*), and *Offerman* v. *Nitkowski, supra.*

In the above cited cases, while they do not deal with teacher assignments, the principles enunciated are clearly applicable in this matter. Not only is it important for teacher integration at all levels (27 administrative posts out of 259 held by Negroes in the Newark school system), but lack of such integration violates the equal protection doctrine, since it imposes unequal burdens or awards unequal benefits. See *Rogers* v. *Paul,* 382 U. S. 198 (1965), where the court recognized that improper racial faculty allocation does in effect deny students equality of educational opportunities. To the same effect we must direct our attention to *Hobson* v. *Hansen,* 269 Fed. Supp. 401 (1967), in which case the court examined a situation with respect to public education where the student population was 90% Negro. Judge Skelly Wright wrote a lengthy opinion on the effects of decisions made by school boards, although not deliberate but having a direct effect upon the Negro community, in violation of the equal protection doctrine. Judge Wright also examined the question of the assignment of teachers, and at p. 516 stated:

> "Next, assignment of incoming teachers must proceed on a *color conscious basis* to insure substantial and rapid teacher integration in every school." (Emphasis supplied)

Nowhere does the petition for review present a federal question of substance not heretofore determined by this court. Nowhere does the petition present a question wherein the Court of Appeals of the Third Circuit has rendered a decision in conflict with the decision of any other court of appeals. In fact, all the courts of appeal

are in complete agreement that color consciousness, used as a basis to insure integration and equal opportunities in compliance with the equal protection clause of the Fourteenth Amendment, is both permissible and mandated.

CONCLUSION

For the foregoing reasons the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 850

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LARUSSO and JOSEPH CHAGNON,

Petitioners,

vs.

FRANKLYN TITUS, Superintendent of Schools of the City of Newark, THE BOARD OF EDUCATION OF NEWARK IN THE COUNTY OF ESSEX,

Respondents,

and

CHARLES HAYNES,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTERVENOR'S BRIEF IN OPPOSITION

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IN THE

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OCTOBER TERM, 1970

VICTOR PORCELLI, FRANCIS BIGLEY, ARTHUR SHAPIRO, ALLAN M. COHN, HELEN R. JUSTIN, MAXINE F. EDELSTEIN, ROBERT J. HICKEY, WILLIAM J. DUNNE, JR., WILLIAM C. LaRUSSO and JOSEPH CHAGNON,

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CHARLES HAYNES,

Intervenor-Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

INTERVENOR'S BRIEF IN OPPOSITION

Statement of Question Presented

I. Whether the Decision of the Third Circuit Court of Appeals Conflicts With the Decisions of Other Circuit Courts?

Statement of the Case

In the interest of brevity Intervenor will not here restate the history of this case and extensive evidence in the record below, which has been well reviewed in the opinions of the District Court, *Porcelli* v. *Titus*, 302 F. Supp. 726 (D. N. J. 1969) (included as Appendix C to the Petition, at p. 10a *et seq.*) and of the Third Circuit (included as Appendix A to the Petition, p. 1a *et seq.*). The central findings below were that:

> "A fair evaluation of the record supports the conclusion that the promotional lists were suspended and the examination system abolished, not simply to appoint Negroes to promotional positions, but to obtain for these positions qualified persons, white or black, whose qualifications were based on an awareness of, and sensitivity to, the problems of educating the Newark school population . . ." 302 F. Supp. at 732-33, Petition p. 23a.

and that

> "The Court is satisfied that in abolishing the examination procedure, there was no intention on the part of the Board to discriminate against white persons or exclude them from consideration for promotional positions. No inference of any such intention can be gleaned from the record. The testimony of several of the witnesses . . . shows that, despite a desire to provide an avenue for the appointment of more Negro administrators, the ultimate objective of the Board was to promote those persons most qualified to suit the needs of the Newark school system. There is nothing in the record to indicate that the Board was attempting to

appoint Negroes in numbers proportionate to the school population." 302 F. Supp. at 733, Petition p. 25a.

The District Court based its decision in part on the testimony of the Superintendent of the Newark's school system:

> "Defendant Titus testified that 'the examination procedure as it has existed since roughly 1953 did not in 1968 necessarily produce the best people for responsible positions of leadership. * * * I felt that in 20 years, 25 years that had elapsed since the procedure was first or originally modified or developed the conditions in the City had changed, educational philosophy had changed. There was a high (sic) premium on sensitivity than had existed hitherto. And for that reason I welcome the opportunity of reviewing the whole procedure. * * * Sensitivity, as I see it, is that element of a person's personality which makes him aware of the problems that are unique to the ghetto, unique to the circumstances surrounding being a member of a minority group, sensitive to educational needs that go (sic) out of the deprived conditions in many of our—most of our school neighborhoods. * * * As I see it, and I see it very clearly in my own mind, anybody who is in a position of leadership today in a city like Newark has to be able to identify, has to be able to understand.' In fact Superintendent Titus testified that he never equated 'high standing on an examination procedure with the ability to successfully administer a school.'" *Porcelli* v. *Titus*, 302 F. Supp. 726, 732, Petition p. 21-22a.

The Court also relied on the expert testimony of Dr. Richard Trent, Associate Professor of Urban Education, and Executive Officer of the Education Opportunity Program at Brooklyn College, that "if you want significant change in the school performance of ghetto population, it is highly advisable to involve as much as you can competent black professionals * * *." Dr. Trent further testified that the presence of a black man in authority is evidence to the children that if they study, they, too, can achieve. In addition, he stated that it is easier for a Negro to discipline ghetto children, and for a Negro to involve Negro parents in the educational process. *Porcelli* v. *Titus,* 302 F. Supp. 726, 733, Petition p. 24a.

The Court also found that at the time of the contested Board action appointing black principals: 1) the percentage of Negroes in the Newark school system was 72.5%, 2) of the 136 principal and vice principal positions, only 3 were held by Negroes, 3) that there had only been 4 Negro principals and vice principals and 1 Negro departmental chairman in the history of the Newark School System. *Porcelli* v. *Titus,* 302 F. Supp. 726, 731, Petition, p. 19a-20a.

Reason fc Denying the Writ

The decision rendered below is not in conflict with the holdings of other circuits.

The sole reason given by Petitioner in support of granting a writ of certiorari is that the decision rendered by the Court of Appeals for the Third Circuit is in conflict with holdings of other circuits. This contention is without merit.

The District Court considered these allegedly conflicting cases, *Wall* v. *Stanley County Board of Education,* 378 F.

2d 275 (4th Cir. 1967); *Kelley* v. *Altheimer,* 378 F. 2d 483 (8th Cir. 1967); *Rolfe* v. *County Board of Education,* 391 F. 2d 77 (6th Cir. 1968); and *Smith* v. *Board of Education,* 365 F. 2d 770 (8th Cir. 1966), and correctly noted that "these cases involved factual situations completely different from the facts in the case at bar." 302 F. Supp. at 733, Petition p. 25a.

These cases are essentially concerned with the following factual patterns: (1) School districts which formerly existed as dual school systems for the respective races prescribed by law; (2) local school boards institute "freedom of choice" plans for student in an effort to comply with *Brown* v. *Board of Education,* 347 U. S. 483, but fail to integrate faculties and staffs; (3) a sizeable number of black students choose to go to the heretofore all-white school; (4) the number of black teachers necessary to administer the black schools is reduced because of decreased student enrollment resulting from the transfers; a number of tenured black teachers are summarily dismissed; and (5) these dismissed black teachers bring a civil rights action alleging that the desegregation plans are legally deficient in that they fail to integrate faculty, and that they as plaintiffs were denied an opportunity to compete for the additional posts available in the primarily white schools because of their race. The courts accede to their arguments stating that, in this context, race is an impermissible consideration in the selection or assignment of teachers in a public school system.

Kemp v. *Beasley,* 389 F. 2d 178 (8th Cir. 1968) and *Board of Public Instruction* v. *Braxton,* 326 F. 2d 616 (5th Cir. 1964), also allegedly in conflict with the decisions below, are also factually distinguishable. In *Kemp* the court rejected the desegregation plan of an Arkansas school district, because the plan did not provide for cor-

recting racial imbalance in school faculties. *Kemp* v. *Beasley, supra* at 188. In *Braxton,* the Court upheld an order forbidding continued assignment of teachers on a racial basis. Racial classifications could not be used to assign black teachers to predominately black schools, thereby perpetuating segregation faculties. *Kemp* v. *Beasley, supra* at 190; *Board of Public Instruction* v. *Braxton, supra* at 620-21.

The Courts in these cases found the purposes for which the racial classifications were made to be objectionable, for race was being used to impose a burden on the black race by maintaining dual school systems which artificially excluded Negro teachers from teaching at formerly all white schools. Race was arbitrarily and invidiously the sole basis for the exclusion. No legitimate governmental aims for said exclusion existed. In this context, race is an "impermissible criterion."

In sharp distinction the Newark Board endeavored to integrate its faculty, and to further the legitimate governmental aim of improving the quality of school education.

Moreover the above cases relied upon by Petitioner voice no opinion on whether race can be considered in integrating principal staffs, and indeed clearly imply that it can be. As such, these cases are consistent with Intervenor's position and the decision below in this case.

The remaining circuit cases cited by Petitioner as being in conflict with the decision below, *Downs* v. *Board of Education,* 336 F. 2d 988 (10th Cir. 1964); *Springfield School Committee* v. *Barksdale,* 348 F. 2d 261 (1st Cir. 1964) represent a different strain—a reluctance of certain courts to require, as a constitutional mandate, that school boards take affirmative action to correct de facto racial

imbalance which is innocent in its origins. These cases, however, do not forbid *voluntary* affirmative action by a school board to redress deprivation based on racial imbalance.

In the *Downs* case it was held that a pattern of de facto segregation resting not on discriminatory practices but on a reasonable application of educational principles did not impose an affirmative duty of racial balancing on the school board. In the *Barksdale* case the court refused to order correction of de facto segregation in a situation where the school board had already established the goal of eliminating racial imbalance within the framework of effective educational procedures. In neither case did the courts say the Constitution forbids the voluntary affirmative action to correct racial imbalance that is the present case. To the contrary *Barksdale* is quoted with approval by the Third Circuit in the present case. *Porcelli* v. *Titus,* Petition p. 6a.

Courts have uniformly refused to enjoin voluntary state actions to reduce de facto racial imbalance. *Offerman* v. *Nitkowski,* 378 F. 2d 22, 24 (2nd Cir. 1967). *Wanner* v. *County School Board of Arlington County, Va.,* 357 F. 2d 452, 455 (4th Cir. 1966); *Tometz* v. *Board of Education,* 39 Ill. 2d 593, 237 N. E. 2d 498, 501; *Booker* v. *Board of Education of Plainfield,* 45 N. J. 161, 212 A. 2d 1 (1965); *Fuller* v. *Volk,* 230 F. Supp. 25 (D. N. J. 1964); *Morean* v. *Board of Education of Town of Montclair,* 42 N. J. 237, 200 A. 2d 97 (1964); *School Comm.* v. *Board of Education,* 352 Mass. 693, 227 N. E. 2d 729 (1967), appeal dismissed, 389 U. S. 572 (1968); *Addabbo* v. *Donovan,* 16 N. Y. 2d 619, 261 N. Y. S. 2d 68, 209 N. E. 2d 112 (1965); *Vetere* v. *Allen,* 15 N. Y. 2d 259, 258 N. Y. S. 2d 77, 206 N. E. 2d 174 (1965); *Balaban* v. *Rubin,* 14 N. Y. 2d 193, 250 N. Y. S. 2d 281, 199 N. E. 2d 375, cert. denied, 379 U. S. 881, 85 S. Ct. 148.

Petitioner has not cited one case where voluntary state action to reduce racial imbalance or to integrate a school system has been enjoined.

Similar support for, rather than conflict with the decision of the Third Circuit, is furnished by the last circuit decision cited by Petitioners. In *Offerman* v. *Nitkowski*, 378 F. 2d 22 (2nd Cir. 1967) parents sought an injunction against implementation of a school board plan to correct de facto racial imbalance in the Buffalo system. The court refused to interfere with the board's desegregation plan, saying:

> "Consideration of race is necessary to carry out the mandate in *Brown*, and has been used, as noted, in cases following *Brown*. Where its use is to insure against, rather than to promote deprivation of equal educational opportunity, we cannot conceive that our courts would find that the state denied equal protection to either race by requiring its school boards to act with awareness of the problem." 378 F. 2d at 24-25.

Finally, the attempt by Petitioners to factually demonstrate racial discrimination has been rejected below, and this Court should defer to the factual findings of the lower courts.

CONCLUSION

The voluntary actions taken by Respondent school board were a conscientious effort to overcome a longstanding racial imbalance in school administration which has resulted in insensitivity and serious deprivations of educational opportunity for thousands of disadvantaged black children. It would be a cruel irony if the principles of the Fourteenth Amendment developed in the cited cases

to enforce the right of the black man to equality before the law were to be used as Petitioner demands, to bar the achievement of equality by the black man in this case.

It is respectfully urged that a writ of certiorari be denied.

Respectfully submitted,

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